

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1111

To be argued by
RONALD L. GARNETT

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1111

UNITED STATES OF AMERICA,

Appellee,

—v.—

BEN LINDSAY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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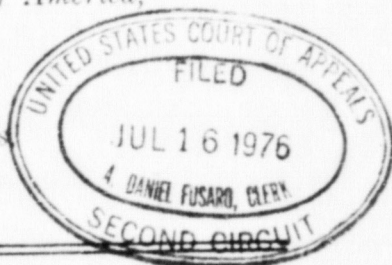


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—v.—

BEN LINDSAY,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Ben Lindsay appeals from a judgment of conviction entered on February 10, 1976, in the United States District Court for the Southern District of New York, after a non-jury trial before the Honorable Thomas P. Grieco, United States District Judge.

Indictment 74 Cr. 1041, filed November 6, 1974, charged Lindsay in one count with conspiracy to engage in the business of dealing in firearms without a license in violation of Title 18, United States Code, Sections 371 and 922(a)(1).

Trial commenced before Judge Griesa on December 19, 1975. At the end of that day, the Court found Lindsay guilty as charged. On February 10, 1976, Lindsay

was sentenced by Judge Griesa pursuant to Title 18, United States Code, Section 3651, to a term of imprisonment of three years and six months; six months of that sentence is to be served in a jail-type institution with the execution of the remainder of the sentence suspended and the defendant placed on probation for a period of three years. Lindsay has been enlarged on bail pending appeal.

Statement of Facts

The Government's Case

The Government's case was presented through the testimony of four witnesses. Rodney Blume, named in the Indictment as co-defendant and co-conspirator, pleaded guilty to conspiracy and testified for the Government. His testimony was corroborated by Robert Preston, an informant, and by Detective James Rodriguez of the New York City Police Department. Michael Zezima, a Special Agent for the Bureau of Alcohol, Tobacco and Firearms, testified that a firearm sold to the agents by the defendant was operable.

On May 5, 1974, Robert Preston, acting in his capacity as an informant, had a telephone conversation with Rodney Blume in which Preston told Blume that he was interested in buying some guns. Blume said that he and a friend would be able to supply Preston with guns. (Tr. 11, 42).^{*} The following day Preston met Blume in an apartment at 145th Street and Willis Avenue, Bronx, New York. At that time Blume told Preston that "if he had known a few days earlier he would have been able to supply [Preston] with what [he] needed." (Tr. 43). Blume also said that on the previous night

^{*} Numerical references are to the page numbers of the trial transcript.

his friend "Ben" had a .25 caliber pistol and a 357 magnum available. Blume was not sure that Ben still had those guns but he could guarantee that a .38 caliber gun was then available. (Tr. 43). Upon leaving the apartment, Preston introduced Blume to Detective Rodriguez and Agent Martinez. Blume assured them that he could supply at least one .38 caliber gun that night. (Tr. 44). Preston, Blume and the agents then proceeded to 168th Street and Franklin Avenue in the agents' automobile.

At that location, Blume and Preston entered an after-hours club and spoke to a woman known as "Moms." Blume asked her if her husband (the defendant, Ben Lindsay) had the gun they had talked about the night before. She said he did and that he was washing up in the rear bathroom. (Tr. 14). Blume then went to the bathroom alone and asked Lindsay if he still had the gun for Blume's customers who were waiting outside in the car. Lindsay said the gun was uptown and that the price was \$45. (Tr. 17).

Blume then introduced Preston to the defendant Lindsay. Blume told Lindsay that Preston was "the fellow I spoke to you about last night." (Tr. 44). Lindsay told Preston that he had "got rid of . . . everything but the .38 at that particular time" (Tr. 44). Thereupon the defendant told Moms that he planned to sell the .38 to Preston. She mentioned the availability of a .32 caliber gun. (Tr. 45); however, before Preston could buy it, another buyer offered \$175 for that gun. (Tr. 20, 45).

In the course of this conversation Lindsay also told Preston he had just sold a sawed-off shotgun, as well as other guns. (Tr. 21, 45, 46). Lindsay stated that he had taken a \$75 deposit on the sawed-off shotgun, and that he therefore could not sell the gun to Preston. However, he said that if that customer did not take the

gun, Preston could have it. (Tr. 47). Finally, Lindsay told Moms to try to locate the person who had brought a shipment of guns from down South while he went to get the .38 caliber pistol for Preston. (Tr. 22, 46).

Lindsay and Preston then proceeded in Lindsay's car to Shakespeare Avenue in the Bronx, followed by the agents and Blume in a second car. During the drive to Shakespeare Avenue, Lindsay told Preston that there would be no problem in supplying Preston with guns from the "barrel" of firearms "he was expecting at any time" from down South. In addition, echoing Blume's earlier statement, Lindsay told Preston that he wished that Preston had contacted him for the guns earlier. (Tr. 70).

At the Shakespeare Avenue location, Lindsay left the car, went into a building, and returned shortly with a .38 caliber revolver. The defendant gave the gun to Blume, who returned to the agents' automobile and gave it to the agents. (Tr. 23, 49; GX 1). The agents paid Blume \$50; Blume kept \$5 for himself and gave \$45 to Lindsay. (Tr. 24-25, 32-33). Before leaving, Lindsay told Preston to call him later about the sawed-off shotgun.

Preston, Blume and the agents then returned to 168th Street and Franklin Avenue where Blume and Preston again met Moms inside the club. Moms told Blume and Preston that she had been unable to contact her connection. (Tr. 26-27, 50). Later that night Preston called Lindsay about purchasing more guns. Lindsay said he could not get any at that time, but that he would have more guns in two or three days. He stated further that the person to whom he had sold the sawed-off shotgun "needed it desperately" and wanted to keep it. (Tr. 71).

Special Agent Zezima testified that the .38 caliber revolver received from Lindsay was operable as a firearm. (Tr. 76).

The Defendant's Case

The defendant offered no evidence.

ARGUMENT

The Evidence Was More Than Sufficient To Support The Conviction of Conspiracy To Deal In Firearms.

Appellant claims that the evidence was insufficient to support the factual finding of guilt made by the District Court.* The test for sufficiency of the evidence is whether a reasonable person could conclude, upon the evidence, that the defendant was guilty beyond a reasonable doubt. *United States v. Wiley*, 519 F.2d 1348, 1349 (2d Cir. 1975); *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972). The Government is entitled, upon appeal, to a review of the evidence in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Winfield*, 341 F.2d 70, 71

* In his brief appellant sets forth his argument in two points. He contends in Point I that "the evidence adduced at the trial below was insufficient" to establish that he conspired with Rodney Blume and others to deal in firearms in violation of 18 U.S.C. §§ 371 and 922(a)(1). (Appellant's Brief at 13-17). In Point II he maintains that his "guilt was not established beyond a reasonable doubt." (*Id.* at 18-19). These are, of course, restatements of the single claim that the evidence adduced at trial was insufficient to prove the guilt of the defendant beyond a reasonable doubt. Accordingly, this brief treats both points as one.

Further, at the conclusion of the Government's case appellant moved to dismiss the indictment and upon appeal that relief is again requested. (Tr. 79; Appellant's Brief at 18). The appropriate procedure below was a motion for judgment of acquittal pursuant to Rule 29, Federal Rules of Criminal Procedure. The Government assumes that this Court will disregard the mislabeling of appellant's motion and reach the merits of the issue raised on appeal.

(2d Cir. 1965) (non-jury trial); *United States v. Tutino*, 269 F.2d 488, 490 (2d Cir. 1959) (non-jury trial). Considering the evidence in that light, the test for sufficiency is more than satisfied.

The essential thrust of the argument on appeal is that, if any conspiracy existed, it did not extend beyond the sale of a single gun and was therefore not a conspiracy to deal in firearms. Thus, Lindsay emphasizes that he "had only one .38 handgun" and no proof was "presented to show that he had the power to procure or control weapons." (Appellant's Brief at 16, 17). However, this argument ignores the substantial evidence from which the District Court could properly find that Lindsay conspired with Blume, Moms, and unidentified suppliers to sell other guns, both before and after the sale of the .38 to Preston.

As to prior sales, Judge Griesa heard evidence that both Blume and Lindsay had expressed regret that Preston had not arrived earlier to purchase guns. (Tr. 43, 70). From the defendant's statement to this effect the District Court could fairly infer that Lindsay had several guns for sale prior to the day he met Preston. The Court could further infer that those guns were not now available because the defendant had succeeded in selling them. Indeed, Lindsay told Preston that "he had got rid of . . . everything but the .38 . . ." (Tr. 44).

The existence of additional gun sales was further exposed by the discussion with Moms of the availability of a .32, for which another customer bid \$175. (Tr. 45). The defendant Lindsay himself discussed the possible sale to Preston of a sawed-off shotgun, on which another customer had left a deposit. (Tr. 21, 45, 46-47). That gun was not sold to Preston only because the customer who left the deposit insisted on buying it. (Tr. 71).

As to future sales, the record reflected that the defendant was more than willing to sell additional guns to Preston. At the defendant Lindsay's behest, Moms at-

tempted to contact the connection who was bringing a shipment of guns from the South — "the barrel" from which Lindsay hoped to sell Preston more guns. (Tr. 70). Moms' inability to make the necessary contact does not absolve Lindsay from his participation in the effort to make the additional sales to Preston if at all possible. The crime of conspiracy is complete whether or not the conspiratorial object is achieved. *United States v. Torres*, 503 F.2d 1120, 1124, n.2 (2d Cir. 1974); *United States v. Cioffi*, 487 F.2d 492, 498 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *United States v. Abel*, 258 F.2d 485, 489 (2d Cir. 1958), *aff'd*, 362 U.S. 217 (1960).*

In addition to his claim that the proof of the extent of the conspiracy was insufficient, Lindsay contends that his participation in the conspiracy was not proved. To this end he argues that he was merely present at the scene of the crime. This contention is frivolous. The District Court could have found, with ample support in the record, that Lindsay was the central figure in this conspiracy.**

* To the extent that Lindsay suggests that he cannot be guilty of conspiracy because he was then unable to sell additional guns, this argument is likewise meritless. The crime of conspiracy does not require a capability for committing the underlying offense. *United States v. Rabinowitch*, 328 U.S. 78, 86 (1915); *United States v. Rosner*, 485 F.2d 1213, 1229 (2d Cir.), *cert. denied*, 417 U.S. 950 (1973).

** The record demonstrated that Lindsay's known co-conspirators were Blume, Moms and the unidentified supplier of guns from the South. Blume's participation was evidenced by his role as an intermediary in the sale of the .38 to Preston, as well as his involvement in discussions about the future gun sales to Preston. (Tr. 23-25, 31-33, 39, 48-49, 50). Moms' participation was demonstrated by her involvement in the discussions about the sale of the .38, as well as the .32. (Tr. 21, 45). Most importantly, Moms proceeded at her husband's request to try to locate the contact for the shipment of guns from the South. (Tr. 22, 26, 46, 50). From this evidence the Court could have similarly found the unidentified supplier of the shipment of guns also to have been a member of the conspiracy.

Lindsay was introduced to Preston by Blume as Blume's friend who could supply the guns that Preston wanted. Lindsay was clearly in charge of the arrangements for the sale of the .38. He named the price; he led the entourage to the location of the sale; he obtained the gun; and he received almost all of the proceeds of the sale. (Tr. 23-25, 32-33, 44). As to Lindsay's role in other gun sales, Lindsay personally expressed regret that Preston did not arrive earlier, explaining that he "had got rid of everything but the .38." (Tr. 44). Furthermore, Lindsay initiated the discussion with Preston about the possible availability of the sawed-off shotgun. (Tr. 21, 45, 46, 47). It was also Lindsay who directed Moms to try to find the connection for the shipment of guns from the South that they were then expecting. (Tr. 22, 46). By each of the acts Lindsay demonstrated his central role in the conspiracy with which he was charged.

Lindsay further attacks the judgment below by claiming that the proof of an overt act was not sufficient. Specifically, he argues that the sale of the .38—one of the overt acts in the indictment—occurred before the conspiratorial agreement since "the arrangements relating to the sale of a .38 were made and completed prior to any discussion about other guns." (Appellant's Brief at 18). This argument falls even as stated since it is apparent that it was the sale of the .38 which constituted the overt act, not the "arrangements" for the sale. The overt act alleged (namely, the sale of the gun), clearly occurred subsequent to almost all of the discussions about other gun sales. Moreover, the District Court would have been well justified in finding the existence of the conspiratorial agreement long before Preston even approached Blume for the purpose of buying the .38. The evidence before the Court supported the inference that Lindsay, together with Moms and Blume, had been engaged in gun sales long before to the sale of the .38.

Finally, Lindsay argues in passing that the testimony of Blume and Preston "should have been received with caution" since these witnesses were "confessed convicts." (Appellant's Brief at 15, 18). Obviously the credibility of these witnesses was a matter to be tested through cross-examination. *Hoffa v. United States*, 385 U.S. 293, 311-312 (1966); *United States ex rel. Portelli v. LaVallee*, 469 F.2d 1239, 1240 (2d Cir.), cert. denied, 411 U.S. 950 (1972). The District Court was entitled to credit their testimony, as it apparently did.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York)

Peter J. Fitzpatrick being duly sworn
deposes and says that he is employed in the office of the
United States Attorney for the Southern District of New
York.

Stating also that on the 16th day of July, 1976
he served a copy of the within
by placing the same in a properly postpaid franked envelope
addressed:

William C. Chance, Jr., Esq.
350 Broadway
New York, N.Y. 10013

And deponent further says that he sealed the said envelope
and placed the same in the mailbox for mailing at the United
States Courthouse, Foley Square, Borough of Manhattan, City
of New York.

Peter J. Fitzpatrick

Sworn to me before this

16th day of July, 1976

Olga C. Grampp

OLGA C. GRAMPP
Notary Public New York State
No. 45-45555
Qualified in Richmond Co.
Comm. Expires March 30, 1977